United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76 5034

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re

INTERSTATE STORES, INC., et al.,

Debtors,

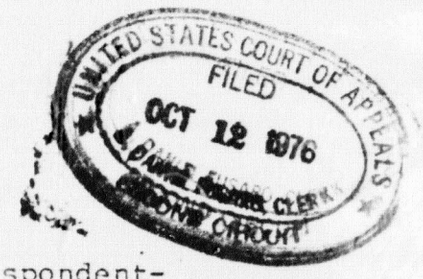
IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI,

Plaintiff-Respondent-Appellant,

-against-

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for WHITE FRONT STORES, INC., et al.,

Defendants-Appellants-Appellees.



B & S

On Appeal from the United States District Court
For the Southern District of New York

REPLY BRIEF OF APPELLANT IRVING SULMEYER,
RECEIVER FOR THE CHAPTER XI
ESTATE OF ESGRO, INC.

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Lawrence Mittman,

Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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REPLY BRIEF OF APPELLANT IRVING SULMEYER, RECEIVER FOR THE CHAPTER XI ESTATE OF ESGRO, INC.

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Preliminary Statement

Irving Sulmeyer, as receiver for the Chapter XI estate of Esgro, Inc.* (hereinafter sometimes collectively referred to as "Esgro"), the Appellant herein, submits this brief in reply to the opposing briefs submitted by Joseph R. Crowley and Herbert B. Siegel, the Chapter X Reorganization Trustees appointed for Interstate Stores, Inc. and its affiliates, including White Front Stores, Inc. ("Trustees"), the Appellees herein, and the Securities and Exchange Commission ("SEC").

The facts pertinent to the appeal have been fully set forth in Esgro's principal brief (Esgro Brief, pp. 7-16). However, the Trustees' brief contains several material errors and misstatements of fact which constrain a response. For purposes of brevity and convenience to the Court, Esgro will limit its response to the most egregious errors and misstatements made by the Appellees.

I

THE ORDER OF THE DISTRICT COURT IS APPEALABLE

The Trustees have made a motion to dismiss Esgro's

* During the course of the proceedings below, the Chapter XI case relating to Esgro, Inc. was confirmed by order of the United States District Court for the Central District of California. The receiver has been discharged, and all property, including the claims against White Front Stores, Inc. et al., have revested in the debtor, Esgro, Inc. pursuant to Section 70i of the Bankruptcy Act, 11 U.S.C. §110(i).

appeal on the grounds that the District Court's order of September 1, 1976, is non-appealable. Argument of that motion is scheduled concurrently with argument of the appeal. The Trustee's motion is ill-founded.

It is incontrovertible that the Bankruptcy Court's order of May 26, 1976, modified the automatic stay of actions in the reorganization cases so as to permit the continued prosecution and trial of the pending action and cross-action (the "California Lawsuit") in the California Superior Court (the "California Court"). This fact is re-affirmed in the Bankruptcy Court's subsequent orders of June 16, 1976 and July 23, 1976.

Contrary to the Trustees' contention that the May 26 order was a limited modification, interlocutory in nature, the express terms of the order and the transcript of the May 26 hearing make it unequivocally clear that the stay was modified unconditionally, subject to the power always inherent in a bankruptcy court, to reinstate a stay upon a future demonstration of the necessity therefor.

The Trustees refer to the provisions of the May 26 order directing the parties to report back to the Bankruptcy Court concerning the status of their application to the California Court for a trial preference, as an indication that the stay was not unconditionally modified. In

fact, however, this is merely reflective of the tenor of the Bankruptcy Court's remarks immediately prior to signing the May 26 order:

> "THE COURT: I rather surmise that Mr. Yassky [counsel for Trustees] may consider coming back in here, calling that to my attention [that the California Court refused to grant a trial preference] and then asking that the stay be reinstated.
>
> Am I correct, Mr. Yassky?
>
> "[COUNSEL FOR TRUSTEES]: Yes." (Joint Appendix, at 300)
>
> ***
>
> "THE COURT: They [the Trustees] have the whip and can come in at any time and ask to have the stay reinstated, because you [Esgro] are not proceeding with due dispatch. It seems to be this simple." (Joint Appendix, at 294)
>
> ***
>
> "THE COURT: We are in a morass which we have already discussed. When the parties who are going to be charged with the responsibility for the trial of the case feel that the other side is not conducting himself properly, the parties can come back to me. Mr. Yassky [counsel for Trustees], if you feel the attorney in California is not proceeding expeditiously, you can always move de novo for a stay, and I will hear the parties.
>
> "[COUNSEL FOR TRUSTEES]: All I submit, your Honor, is that everything that has been said and agreed upon so far

is encompassed in the third and fourth paragraphs. As to the fifth paragraph --" (Joint Appendix, at 310)

The Trustees also gloss over the fact that the May 26 order directed that all further pre-trial discovery be conducted under the auspices and control of the California Court. The purpose and intent of the Bankruptcy Court's handwritten insertion in the third decretal paragraph of the May 26 order of the language, ". . . to the extent heretofore noticed or served. . .," (Joint Appendix, at 323) was to limit further discovery on the Trustees' objection to Esgro's claim in the Bankruptcy Court, and to direct that all further discovery proceed in the California Court.

It is interesting to note the Trustee's reliance on the fact that no appeal was taken from the May 26 order. This point was raised by Esgro at the hearing held before the Bankruptcy Court on July 20, 1976, upon the Trustees' application for the fixing of a trial date on their objection to Esgro's claim. (Joint Appendix, at 459). The Bankruptcy Court's comments on this point are enlightening.

"THE COURT: Wait a minute.

"[COUNSEL FOR TRUSTEES]: I'm sorry, I apologize.

"THE COURT: That's all right. At this period you are just rehashing the original adversary proceeding.

"[COUNSEL FOR TRUSTEES]: I don't want to do that.

"THE COURT: That's what you're trying to do, and I'm not going to let you." (Joint Appendix, at 467)

Thus, the Bankruptcy Court recognized the Trustees' application to be nothing more than an attempt to relitigate the Bankruptcy Court's previous orders modifying the stay or at best, an application to reinstate the stay. Consequently, at the conclusion of the hearing the Bankruptcy Court stated that:

"No cause has been shown to indicate that there should be any relief granted inconsistent with the prior decision on the adversary proceedings." (Joint Appendix, at 479)

Thereafter, the Bankruptcy Court entered its order of July 23, 1976, from which the Trustees appealed to the District Court. Thus, the Trustees' contention that the Bankruptcy Court never modified the stay, is spurious.

II

THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION BY MODIFYING THE STAY AND ALLOWING THE CALIFORNIA LAWSUIT TO PROCEED

As demonstrated in Esgro's principal brief on appeal, the Bankruptcy Court's modification of the stay against continued prosecution and trial of the California Lawsuit was an exercise of sound discretion, fully supported by the evidence adduced at the trial on May 21, 1976, as incorporated in the findings of fact set forth in its order of July 23, 1976.

The only argument proferred by the Trustees in opposition to a modification of the stay, was "... that the pendency of the Esgro claim was the principal impediment to the formulation of [a plan of reorganization]." (Trustees' Brief, at 12.) The Trustees' only objection to a modification of the stay was that if the California Court refused to grant a trial preference, resolution of Esgro's claim might be delayed. As stated by counsel to the Trustees at the hearing before the Bankruptcy Court on May 26, 1976:

> "Let's get a reading from that California court. If we can try that action in a month or four months or three months or a short period of time, we'll be glad to go to California." (Joint Appendix, at 291).

Thereafter, upon application of the Trustees, the California Court granted the trial preference, fixing November 29, 1976, a date agreed upon by counsel for the Trustees, as the date of commencement of jury trial. As stated in the affidavit of Robert L. Holtzman, the Trustees' California counsel, submitted by the Trustees at the hearing of July 20, 1976:

> "4. The Setting Clerk then offered us November 15, November 22 and November 29, 1976 as trial dates. Noting that starting dates of November 15 and November 22 would provide limited preparation time following the preceding trials, and that the week of November 22 would only be a partial week due to the Thanksgiving Holiday, we selected the November 29 date as the earliest compatible with our trial

> calendars, the calendar of the court, and the need for adequate last minute preparation." (Joint Appendix, at 417-418).

Thus, on this appeal, the Trustees are reduced to the argument that the success or failure of the reorganization cases hinges upon a difference of slightly more than one month, i.e., the trial date of November 29 fixed by the California Court and the date of October 18, fixed by the District Court's order of September 1, 1976.

The Trustees' oft-repeated claim of prejudice to the reorganization cases as a result of the Bankruptcy Court's modification of the stay, is belied by their own testimony at the trial of May 21, 1976. During the course of cross-examination by Esgro, it was established that nothing had been done in the reorganization cases as to (a) valuation of the businesses of the debtors as going concerns (Joint Appendix, at 145-158), an essential prerequisite in Chapter X to formulation of a plan; (b) the determination of whether $65 million of institutional lender claims are secured or unsecured (Joint Appendix, at 164); (c) resolution of disputed claims other than of Esgro, aggregating $30 million (Joint Appendix, at 145,149); and (d) formulation of a plan of reorganization (Joint Appendix, at 153, 167-169). Clearly, these facts provided more than ample grounds for the Bankruptcy Judge who has administered these reorganization cases on a daily basis, pursuant to the general reference orders

of District Judge John M. Cannella, for over two years, to find that:

> "8. No prejudice, harm or disability is incurred by the Reorganization Trustees and the reorganization cases by modification of the automatic stay under Chapter X Rule 10-601 so as to allow the prosecution and trial of the California action." (Joint Appendix, at 485).

The Trustees' contention that were it not for the Esgro claim they would be able to file a Chapter X plan "* * * at the earliest possible time * * *" (Trustees' Brief at 32), is also belied by a statement in their application to the Bankruptcy Court dated September 17, 1976, a copy of which is appended hereto, in which they seek authority to retain the firm of Kuhn, Loeb & Co. to assist in the valuation of the debtors' estates. As justification for the retention of Kuhn, Loeb & Co. at a fee of $150,000, plus reimbursement of out-of-pocket expenses, the Trustees' stated:

> "5. In connection with the formulation of the plan, Applicants [Trustees] will also require the advice and assistance of investment bankers on such matters as the type and terms of any securities which may be distributed to creditors in exchange for their claims and the fair value of such securities. Such advice will be necessary in order to comply with the statutory standard that the plan be 'fair and equitable' as well as obtaining the proper capitalization for the reorganized company in order that the standard of 'feasibility' also be obtained. <u>It is also anticipated that many sophisticated financial considerations will develop in the course of formulating and</u>

> preparing the plan and that the assistance of sophisticated and expert investment bankers will be required. * * * It is incumbent that this proceeding, being one of the largest and most complicated proceedings under the Bankruptcy Act, have the benefit of such advice." (Trustees' Application for Authority to Retain Kuhn, Loeb & Co., September 17, 1976, ¶5) (Emphasis supplied.)

The very nature of the complexity of the assignment facing Kuhn, Loeb & Co. is underscored by the Trustees' statement in their September 17th application that it took "several months" for them to engage an investment banker for the valuation assignment. (Trustees' Application for Authority to Retain Kuhn, Loeb & Co., September 17, 1976, at ¶6). Based on the Trustees' representations in their September 17th application, Bankruptcy Judge Ryan on September 29, 1976 entered an order "* * * authorizing said Trustees' to retain Kuhn, Loeb & Co. as financial experts and consultants to the Trustees and the estates herein" (Order dated September 29, 1976). Apparently, the Trustees by their own admission have quite a distance to travel before they will be in a position to formulate a Chapter X plan.

The Trustees also argue that the fact that a trial before the District Court would work a denial of an opportunity for a trial by jury of the controversy between Esgro and the debtors is "* * * answer[ed] * * * [by the fact] that there is no right to a jury trial on a claim filed in a

bankruptcy proceeding. * * * [For otherwise] many claims, routinely handled by bankruptcy courts, such as claims for goods sold and delivered, could not be heard" (Trustees' Brief at 30-31). These arguments conceal rather than confront the issue in this case. The issue presented here is whether the bankruptcy court, if given the opportunity, should defer to a court independent of the reorganization cases where the opportunity of a jury trial is present and which is at home with the state law governing the controversies.

The Trustees place principal reliance on In re Michigan Brewing Co., 24 F. Supp. 430 (W.D. Mich. 1938), aff'd, 101 F.2d 1007 (6th Cir. 1939) in support of their position that Bankruptcy Judge Ryan abused his discretion in modifying the stay. Contrary to the Trustees' assertion that "[t]he Michigan Brewing case presented issues strikingly similar to those presented here," (Trustees' Brief at 30) it is submitted that that case is completely inapposite to the issue before this Court on appeal. First, the California Court has already granted a trial date of November 29, 1976, only slightly more than a month from the date hereof. In the Michigan Brewing case, it is nowhere stated as to when a resolution of the disputes could be reached in the state court and the court was influenced by the fact that "the state court might be long delayed by action or non-action

of other defendants." 24 F. Supp. at 431. Neither of these circumstances is present here.

On the contrary, the evidence adduced at the trial of the adversary proceeding conducted before Bankruptcy Judge Ryan on May 21 and May 26, 1976 clearly militated towards modification of the stay. At the trial it was established that: (a) many of the witnesses having personal knowledge of the facts material to the California Lawsuit reside in California (Joint Appendix, at 56, 77-80); (b) parties to the California Lawsuit were not subject to the jurisdiction of the Bankruptcy Court (Joint Appendix, at 57, 207); (c) a trial of the Trustees' objection to the allowance of the claim of Esgro filed in the Chapter X case would not completely resolve all of the issues raised in the California Lawsuit and would leave unresolved the Trustees' principal claims in the California Lawsuit (Joint Appendix, at 164; Trustees' Brief at 3); (d) the issues involved in the California Lawsuit action and cross-action were closely intertwined (Joint Appendix, at 112-114, 164-165, 225); (e) California state law governs the issues between the parties (Joint Appendix, at 56, 11-115); and (f) a trial by jury was available to the parties in the California Court (Joint Appendix, at 140).

Since the Trustees were unable to demonstrate that the continued prosecution of the California Lawsuit would encumber the reorganization proceedings, District Judge Cannella's decision to reinstate the stay was in error:

"Section 77b(c)(10), enlarging power conferred by §11, broadly declares that the judge 'may enjoin or stay the commencement or continuation of suits against the debtor until after final decree.' The exclusive jurisdiction given the court over the debtor and its property, subd. (a), does not imply that the commencement or carrying on of suits against the debtor must be enjoined or that all claims must be referred to a master for consideration and report . . . . The power to stay does not imply that it is to be, or appropriately may be exerted without regard to the facts. The granting or withholding of injunction is left to the discretion of the court."

* * *

The record contains no opinion or statement of the district judge to disclose the grounds on which he rested his denial [of the application to modify the stay]. In reorganization proceedings neither the Act nor any rule of law entitles debtors or trustees as a matter of right to enjoin the trial of actions such as that brought by petitioner.... The reorganization proceedings are not inherently inconsistent with a jury trial for the liquidation of such claims. Unless satisfactorily shown that the prosecution of petitioner's action would embarrass the administration of the debtor's estate, the district court should have granted leave." Foust v. Munson S.S. Lines, 299 U.S. 77, 83-84 (1936) [Citations omitted.]

The reasoning of the Foust case applies to the case at bar because the Trustees have not demonstrated how the prosecution of Esgro's claim in the California Court would embarrass the administration of the estate herein.

District Judge Marvin E. Frankel, in In Re Zeckendorf, 326 F. Supp. 182 (S.D.N.Y. 1971), reversed an order of the Bankruptcy Court which had denied a creditor's application to continue his prosecution of a previously commenced securities

fraud action. According to District Judge Frankel, "a stay should not be rigidly enforced when no sound reasoning is shown to require it and where there is good reason for its modification." 326 F. Supp. at 184. The Court emphasized that the burden of demonstrating the need for a stay of a pending action lies with the debtor or trustee, as the case may be:

> "[The referee] may have been misled at the threshold when he placed the burden of demonstration and persuasion upon the movants. The restraining order was never contested until now. No particular and affirmative showing of need was ever made for it. None has been made now. But the restraint is not a matter of right. Foust v. Munson S.S. Lines, supra; 8 Collier on Bankruptcy 254 (14th Ed.). The problem should preferably have been approached at the outset by treating the stance of the debtor as 'not substantially unlike that of [a suitor] for injunction * * *.' Foust, supra, 299 U.S. at 86, 57 S. Ct. at 95." 326 F.Supp. at 184.

Here as in Zeckendorf, the Trustees have not demonstrated how the continued prosecution of the California Lawsuit would embarrass, hinder, burden or delay the pending reorganization proceedings.

In the case at bar, a modification of the stay of actions so as to permit Esgro to proceed in the California Court against Interstate, as well as the other defendants, would enable all parties to obtain expeditiously a complete resolution of the entire controversy in one forum. In contrast, a trial of the issues between Esgro and Interstate

in the reorganization court would only dispose of part of the controversy in a piecemeal manner, and, as noted above, might lead to possibly inconsistent results. Indeed, applying District Judge Frankel's reasoning to the case at bar, "awkward and obstructive results will follow [the Trustees'] insulation from the [California Court] action." 326 F. Supp. at 185.

III

ON APPEAL THE FINDINGS OF THE BANKRUPTCY COURT MUST BE SUSTAINED UNLESS SHOWN TO BE CLEARLY ERRONEOUS

The SEC contends that "* * * a reviewing court should look to whether the district judge abused his discretion, not whether the bankruptcy judge was 'clearly erroneous,' the test in Bankruptcy Rule 810." (SEC's Brief at 6). The SEC's apparent attempt at rewriting the Rules of Appellate Procedure and Practice and the Bankruptcy Rules is totally devoid of any legal merit. The position taken by the SEC is without any other support other than the SEC's ipse dixit.

In the case at bar, the Trustees appealed from Bankruptcy Judge Ryan's order dated July 23, 1976 pursuant to Chapter X Rule 10-801. Chapter X Rule 10-801 entitled "Appeal to District Court," reads in part relevant hereto, as follows:

> "Part VIII of the Bankruptcy Rule applies in Chapter X cases * * * "

The advisory committee's note to Chapter X Rule 10-801 reads in part relevant hereto, as follows:

> "Part VIII of the Bankruptcy Rules (Rules 801 to 814 inclusive) are incorporated to govern appeals from judgments or orders of referees to district courts in Chapter X cases."

Moreover, District Judge Cannella's general reference order to Bankruptcy Judge Ryan dated August 14, 1975, a copy of which is annexed to the supplemental affidavit of Martin I. Shelton in support of the Trustees' motion to dismiss the appeal, as Exhibit "C", reads in relevant part as follows:

> "ORDERED, that any and all matters arising in the captioned cases, except as hereinafter provided, be, and they hereby are, referred pursuant to the provisions of Rule 10-103 of the Chapter X Rules to the Honorable Edward J. Ryan, as Bankruptcy Judge, to hear and determine and enter orders thereon * * *"

The advisory committee's note to Chapter X Rule 10-103 makes it absolutely clear that the "clearly erroneous" standard of Bankruptcy Rule 810 is applicable after a general reference, when the district judge is reviewing a decision of the bankruptcy judge to whom the case was referred. The advisory committee's note reads in part relevant hereto, as follows:

> "After the reference the district judge may act in a corporate reorganization case only when he withdraws a case from the referee pursuant to subdivision

> (b); when the office of referee becomes vacant as provided in §43c of the Act; when the district judge hears and determines issues under Bankruptcy Rule 920 on a certification that contempt has been comitted; when a complaint seeks injuntive relief against another court, which may be granted under §2a(15) of the Act only by a judge; or when a judgment of the referee is being reviewed on appeal pursuant to §2a(10) and 39c of the Act. The Rules of Part VIII govern the procedure on review by the district judge of judgments of the referee in Chapter X cases." (Emphasis supplied.)

In an opinion and order dated July 19, 1976, District Judge Cannella recognized that in connection with these reorganization cases he is bound by the "clearly erroneous" standard of Bankruptcy Rule 810 when reviewing Bankruptcy Judge Ryan's decisions and orders:

> "Pursuant to Bankruptcy Rule 10-103(a)(2), this Chapter X case [i.e., the Interstate Chapter X case] was referred to Judge Ryan for all purposes save those expressly reserved to the district court by Rule 10-103(a)(1). This appeal is before this Court by reason of Rule 10-103(a)(1) which provides that appeals from decisions of bankruptcy judges hearing Chapter X cases by reference are to proceed in the same manner as any appeal from a determination of a bankruptcy judge." (District Judge Cannella's opinion and order, July 19, 1976, at 1.)

It is clear that there is absolutely no support for the SEC's attempt to rewrite the Bankruptcy Rules for purposes of this appeal. The proceeding before this Court is an appellate one, and the standard set by Bankruptcy Rule 810 is clearly applicable.

CONCLUSION

The order of the District Court should be reversed and the continued prosecution of the California Lawsuit allowed in accordance with the order of the Bankruptcy Court.

Respectfully,

WEIL, GOTSHAL & MANGES
Attorneys for Appellant
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

Harvey R. Miller,
Bruce R. Zirinsky,
Lawrence Mittman,

Of Counsel.

APPENDIX TO REPLY BRIEF OF APPELLANT

SOUTHERN DISTRICT OF NEW YORK

SEP 22 1976

EDWARD J. RYAN
BANKRUPTCY JUDGE

In re	REORGANIZATION
INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al.,	Nos. 74 B 614-802 Inclusive
Debtors.	NOTICE OF SETTLEMENT

S I R S :

PLEASE TAKE NOTICE that an order, of which the within is a true copy, will be presented for settlement to the Honorable Edward J. Ryan, Bankruptcy Judge, at the United States Courthouse, Foley Square, New York, New York, Room 236, on the 29th day of September, 1976 at 2:15 P.M.

Dated: New York, New York
September 17, 1976

Yours, etc.

SHEA GOULD CLIMENKO & CASEY

By _____
A Member of the Firm
Attorneys for the Trustees
330 Madison Avenue
New York, N.Y. 10017
(212) 661-3200

TO: Zalkin, Rodin & Goodman
750 Third Avenue
New York, N.Y. 10017

Popper & Popper
200 Fifth Avenue
New York, N.Y. 10010

Securities and Exchange Commission
26 Federal Plaza
New York, N.Y.
Attention: Jerome Feller, Esq.

Granted
Edward J. Ryan

In re	
INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al.,	REORGANIZATION
Debtors.	Nos. 74 B 614-802 Inclusive
	ORDER

At New York, New York, in said District

on the day of September, 1976

This cause having come on to be heard on September 29, 1976 upon the application dated September 17, 1976 of Joseph R. Crowley and Herbert B. Siegel, Trustees of the debtors herein, for an order authorizing said Trustees to retain Kuhn Loeb & Co. as financial experts and consultants to the Trustees and the estates herein.

NOW, upon said application and the hearing held before the undersigned on September 29, 1976, and all parties present having an opportunity to be heard, and on motion of Shea Gould Climenko & Casey, attorneys for the Trustees herein, it is

ORDERED, that the Trustees herein are hereby authorized to retain Kuhn Loeb & Co. as financial experts and consultants to the Trustees for a fee of $150,000 and reimbursement of out-of-pocket expenses to be paid periodically as services are performed.

Bankruptcy Judge

Unsigned

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	
INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al.,	REORGANIZATION
Debtors.	Nos. 74 B 614-802 Inclusive
	APPLICATION

TO: HONORABLE EDWARD J. RYAN
BANKRUPTCY JUDGE

The application of JOSEPH R. CROWLEY and HERBERT B. SIEGEL respectfully shows and alleges:

1. On May 22, 1974 the captioned debtors filed petitions under Chapter XI §322 of the Bankruptcy Act and, thereafter, an amended petition for reorganization pursuant to the provisions of Chapter X of the Bankruptcy Act was filed on June 13, 1974. Said amended petition was thereafter approved by order of this Court dated June 13, 1974. Pursuant to said order, your Applicants were appointed, have qualified and are now acting as the Trustees of the captioned debtors.

2. Applicants request authority to retain the firm of Kuhn Loeb & Co. to provide certain financial services to the Trustees and the estates herein.

3. Applicants are engaged in the formulation of a plan of reorganization for the debtors in this proceeding and, depending primarily on the resolution of their objections to certain remaining claims, Applicants hope to file a plan or plans with this Court in the near future.

4. An essential element in the formulation of the plan is a determination as to whether the debtors are solvent on a going concern reorganization basis. This determination will require a valuation of the debtors' estates and it is necessary to retain an expert investment banking firm for this purpose. It is anticipated that the firm would also be an expert witness at the hearings before this Court to approve and/or confirm such plan.

5. In connection with the formulation of the plan, Applicants will also require the advice and assistance of investment bankers on such matters as the type and terms of any securities which may be distributed to creditors in exchange for their claims and the fair value of such securities. Such advice will be necessary in order to comply with the statutory standard that the plan be "fair and equitable" as well as obtaining the proper capitalization for the reorganized company in order that the standard of "feasibility" also be obtained. It is also anticipated that many sophisticated financial considerations will develop in the course of formulating and preparing the plan and that the assistance of sophisticated and expert investment bankers will be required. Applicants are advised that it is customary for debtors and trustees to retain investment advice in substantial corporate rehabilitations and reorganizations under Chapters X and XI. It is incumbent that this proceeding, being one of the largest and most complicated proceedings under the Bankruptcy Act, have the benefit of such advice.

6. During the prior several months, Applicants have discussed the engagement of financial advisers with a number of this country's leading investment banking firms. Several

of these firms declined interest in the engagement or were disqualified for possible conflicts of interest.

7. Based on Applicants' evaluation of the presentations made to Applicants, professional reputation, depth of financial services available and other factors, Applicants have chosen Kuhn Loeb who have offered a proposal which is acceptable to Applicants.

8. Kuhn Loeb has agreed to provide the services described above for a fee of $150,000, plus reimbursement of out-of-pocket expenses, to be paid periodically as services are performed. In the course of Applicants' discussion with a number of other leading firms, Applicants believe that the fee is reasonable and appropriate in the circumstances of this proceeding. Applicants believe that Kuhn Loeb is eminently qualified for this engagement.

WHEREFORE, Applicants pray for authority to retain Kuhn Loeb & Co. on the terms and conditions set forth in this application, and for such other and further relief as may appear just and proper.

Dated: New York, New York
September 17, 1976

Joseph B. Crowley

JOSEPH B. CROWLEY, Independent Trustee

Herbert B. Siegel

HERBERT B. SIEGEL, Additional Trustee.

SHEA GOULD CLIMENKO & CASEY
Attorneys for the Trustees
330 Madison Avenue
New York, New York 10017
(212) 661-3200

By Lester Jacobs
A Member of the Firm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

In re :

INTERSTATE STORES, INC., formerly known as INTERSTATE DEPARTMENT STORES, INC., et al., :

Debtors. :

- x

Reoganization

Nos. 74 B 614-802 Inclusive

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BRENDA CASSON, being duly sworn, deposes and says:

1. Deponent is in the employ of Shea Gould Climenko & Casey, attorneys for the reorganization Trustees herein, is over 18 years of age, is not a party to this action and resides at 301 West 45th Street, New York, New York 10036.

2. Deponent served the within notice of settlement, order and application on the persons set forth thereon by depositing, on September 17, 1976 a true and correct copy of same properly enclosed and addressed in a post paid envelope in an official depository maintained and exclusively controlled by the United States Post Office Department at 330 Madison Avenue, New York, New York 10017, said address being the post office address of the attorneys for the Trustees.

Brenda Casson
Brenda Casson

Sworn to before me this
17th day of September , 197 .

Notary Public

GILBERT E. ROTKIN
Notary Public

REORGANIZATION

INDEX NO. 74 B 614-802, Inclusive

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Re
INTERSTATE STORES, INC.,
formerly known as INTERSTATE
DEPARTMENT STORES, INC.
et al.,

Debtors,

NOTICE OF SETTLEMENT,
ORDER, APPLICATION and
AFFIDAVIT OF SERVICE

SHEA GOULD CLIMENKO & CASEY

330 MADISON AVENUE

NEW YORK, N. Y. 10017

(212) 661-3200

ATTORNEYS FOR Reorganization Trustees

Forty Wall Street

KUHN, LOEB & CO. New York, N.Y. 10005

September 20, 1976

Trustees' 1 ext
9/29/76

Messrs. Joseph Crowley and Herbert S. Siegel
As Trustees of Interstate Stores, Inc.
Under Chapter X of the Federal Bankruptcy Act
111 Eighth Avenue
New York, New York 10011

Dear Sirs:

You have asked us for a letter (i) outlining our understanding of the assignment envisioned by the Trustees of Interstate Stores, Inc. (Interstate) in retaining investment bankers to assist them in the reorganization of Interstate pursuant to Chapter X of the Bankruptcy Act, (ii) our fee requirements in the event we were asked to undertake such an assignment, and (iii) our experience and qualifications to undertake such an assignment including personal resumes of the partners of the firm that would be directly involved. We have already sent you a letter disclosing any holdings that we might have in the securities of Interstate and affirming any present or past relationships that might raise a possible conflict of interest.

It is our understanding that the assignment falls generally into two parts.

First, the Trustees will require a valuation of Interstate as a precondition for developing a plan of reorganization. The valuation will be based, in part, on a report to be prepared by Touche, Ross & Co. which will review Interstate's financial and operating projections. The valuation will, if appropriate, also utilize outside appraisals of certain real estate properties owned or leased by Interstate. It is our understanding that the Trustees will require the valuation to be completed approximately eight to ten weeks after the commencement of the assignment.

Second, the Trustees will require the advice and assistance of the investment bankers in the development of a reorganization plan. Although the reorganization plan, in accordance with Chapter X requirements, will follow the absolute priority rule, it will require a new capital structure that

will reflect prudent financial policy and will permit new money financing when appropriate. It will also require the issuance of debt and possibly equity securities the terms of which will have to be determined. In addition, the creditors and the court will have to be satisfied that the securities to be issued possess investment characteristics which will make them acceptable in public markets and that their value will be as represented in the plan. It is our expectation that the reorganization plan will be formulated by the Trustees and that the role of the investment bankers will be to provide appropriate financial advice and assistance to the Trustees.

In addition to a valuation of Interstate and advising and assisting the Trustees in the development of a plan of reorganization, it would be our expectation that the Trustees may call upon us to advise or assist them in other financial matters relating to the reorganization. It is also our expectation that we may be called upon to provide testimony in court proceedings relating to our valuation, the reorganization plan and other matters.

In consideration of our services as outlined above, our fee would be $150,000, payable periodically as the services are rendered, and we would be reimbursed for all out-of-pocket expenses. Should our services be required substantially beyond the presently expected date of approval of a reorganization plan, we would receive additional compensation in an amount to be mutually agreed upon.

As you may be aware, Kuhn, Loeb & Co. has for many years been a leading investment banking firm with extensive experience in reorganization and recapitalization proceedings. In recent years, we have been financial advisors to the Trustees of the Penn Central Transportation Company pursuant to its reorganization under Section 77 of the Bankruptcy Act and financial advisors to Daylin, Inc. pursuant to its reorganization under Chapter XI of the Bankruptcy Act. We have also been advisors to certain companies, including American Export Industries, Inc., MCI Communications Corp. and Mattel, Inc., which have been recapitalized outside formal bankruptcy proceedings.

Kuhn, Loeb & Co. has also had long experience in the valuation of different kinds of securities. During the past ten years, we have undertaken valuations for substantially more than 100 U.S. companies in connection with mergers and acquisitions, recapitalization and reorganization proceedings, tax and other matters.

In addition, we have, as agent and as principal, raised billions of dollars in debt and equity capital in the United States and abroad for U.S. corporations, government entities and others and consequently are deeply experienced in the underwriting, marketing and trading of securities.

Enclosed is a book describing the activities of the firm.

As part of our investment banking experience, we have in recent years been investment bankers to certain retailing companies, including Great Atlantic & Pacific Tea Company, Inc., Supermarkets General Corporation, Daylin, Inc. and Handy Dan Home Improvement Centers, Inc. Our activities for these companies have included the raising of debt and equity capital both publicly and privately, valuations of certain operations, advising on acquisitions, divestments and other matters and, in the case of Daylin, Inc. the rendering of financial advice in connection with its reorganization pursuant to Chapter XI of the Bankruptcy Act.

If Kuhn, Loeb & Co. were asked to undertake the above assignment, we would assign a team of partners and associates with experience in corporate reorganizations and the valuation of securities, and with particular experience in the retailing industry. The team would include John S. Guest (age 63, partner since 1961), Joseph F. Schwartz (age 54, partner since 1968), and T. Richard Fishbein (age 38, partner since 1975). In addition, two or more associates of the firm would specifically be assigned to the project. The personal resumes of the three partners who would be assigned to this project are attached.

If the Trustees wish us to undertake the above assignment under the conditions described above, we would expect to enter into a letter agreement with the Trustees that would then be submitted to the reorganization court. Upon approval of the agreement by the court, we would begin work immediately.

If there are any questions concerning the above, please feel free to get in touch with me, Mr. Schwartz or Mr. Fishbein.

Sincerely,

John S Guest

John S. Guest

JSG/lc
Enclosure

JOHN S. GUEST

John S. Guest joined Kuhn, Loeb & Co. in 1937 and became a general partner January 1, 1961. Mr. Guest was born May 14, 1913 and is a graduate of Cambridge University, England, and Harvard Business School.

Mr. Guest is a senior partner of Kuhn, Loeb & Co. and a member of the firm's Policy Committee. His principal responsibility for a number of years has been the structuring of corporate offerings and private placements, recapitalizations, mergers and acquisitions. He has had extensive experience in the valuation of businesses, which is the essential basis for the development of sound capital structures and the underwriting and placement of corporate securities.

Since 1970 Mr. Guest has headed a Corporate Finance Department team which has provided financial advice to the Trustees of Penn Central Transportation Company. This work has included valuations of Penn Central railroad, real estate and miscellaneous assets, opinions as to the viability (or non-viability) of these operations, and development of a number of alternative recapitalization plans.

Mr. Guest has testified as an expert witness before committees of the U.S. Senate and House of Representatives, the Interstate Commerce Commission and the Penn Central Reorganization Court. His testimony in these proceedings covered the valuation of businesses, the feasibility of projects and the financial characteristics of capital structures.

1956 - 1960 Dartmouth College
A.B.; Magna Cum Laude; Phi Beta Kappa.
Recipient of the James F. Reynolds Fellowship
for foreign study.

Born 1938, New York City.

JOSEPH F. SCHWARTZ

Joseph F. Schwartz joined Kuhn, Loeb & Co. in 1952 and became a General Partner on January 1, 1968. He was born on November 10, 1921, received a B.B.A. cum laude from C.C.N.Y. in 1946 after serving in the U.S. Signal Corps in the Southwest Pacific for three years and in June, 1950, received his M.B.A. from N.Y.U. After graduation from C.C.N.Y., Mr. Schwartz was an economist with Moody's Investors Service for four years and a securities analyst at Dreyfus & Co. for one year prior to joining Kuhn, Loeb & Co.

At Kuhn, Loeb & Co., Mr. Schwartz has specialized in corporate finance and is now responsible for the training and supervision of the associates in the corporate finance department. Mr. Schwartz has been involved in the structuring and negotiation of mergers and acquisitions. He has appeared as an expert witness to give testimony in connection with mergers and has written many opinions relating to the fairness of terms in mergers and acquisitions. Mr. Schwartz has also been involved in numerous financings and has often advised Kuhn, Loeb clients as to the most advantageous methods of raising capital. Mr. Schwartz has been a Director of Laclede Steel Company since 1970.

T. RICHARD FISHBEIN

BUSINESS EXPERIENCE

1965 - Present	Kuhn, Loeb & Co. General Partner since January 1, 1975
	Corporate finance (1968 - present): underwriting of debt and equity securities; private placement of debt securities; mergers and acquisitions, tender offers, divestitures, spin-offs and other corporate transactions; merger and tax valuations; and financial planning studies. Worked with companies in the coal, oil, steel, flat glass, food, protective services, retailing, leisure time and consumer products fields.
	In 1972 and 1973, was engaged in the recapitalization of Mattel, Inc. Since September 1975, have participated in the Kuhn, Loeb group advising the Trustees in the reorganization of Penn Central Transportation Company pursuant to Section 77 of the Bankruptcy Act. During 1976, have been engaged in the valuation of securities and other matters for Daylin, Inc. pursuant to its reorganization under Chapter XI of the Bankruptcy Act.
	Research (1965 - 1967): security analysis of aerospace, broadcasting, trucking, retailing and other industries.
1963 - 1965	King Broadcasting Company, Seattle, Washington Assistant to the Vice President - Finance

EDUCATION

1961 - 1963	Harvard Graduate School of Business Administration M.B.A.; concentration in finance.
1960 - 1961	Bologna Center Diploma for one year of graduate work in international relations at an affiliate of Johns Hopkins University in Bologna, Italy.

Index No. 76 - 5034 *Year 19*

IRVING SULMEYER et al.

v.

JOSEPH CROWLEY et al.

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

Attorneys for **WEIL, GOTSHAL & MANGES**
SULMEYER

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022
(212) 758-7800

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* *19*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* *19* *, at* *M.*

Dated:

Attorneys for **WEIL, GOTSHAL & MANGES**

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022

To:

Attorney(s) for

STATE OF NEW YORK, COUNTY OF

ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Check Applicable Box

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated:

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF

ss:

being sworn says: I am

☐ Individual Verification — in the action herein: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

Check Applicable Box

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF

ss:

age and reside at being sworn says: I am not a party to the action, am over 18 years of

On , 19 , I served a true copy of the annexed in the following manner:

☐ Service By Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

☐ Personal Service — by delivering the same personally to the persons and at the addresses indicated below:

Check Applicable Box

Sworn to before me on , 19

(Print signer's name below signature)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re	
INTERSTATE STORES, INC., et al.,	
Debtors,	
IRVING SULMEYER, as Receiver for the Estate of ESGRO, INC., a Debtor in Chapter XI,	Docket No. 76-5034
Plaintiff-Respondent-Appellant,	
v.	
JOSEPH R. CROWLEY, et al.,	
Defendants-Appellants-Appellees.	

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LAWRENCE MITTMAN, being duly sworn, deposes and says:

1. I reside at 473 F.D.R. Drive, New York, New York 10002, I am over 18 years of age and I am not a party to the within proceedings.

2. On October 12, 1976, I served by certified mail, return receipt requested two copies of appellant's reply brief in the above-entitled case upon Shea, Gould,

Climenko & Casey, attention Daniel Carroll, Esq., 330 Madison Avenue, New York, New York 10017; Zalkin, Rodin & Goodman, attention Richard Toder, Esq., 750 Third Avenue, New York, New York 10017; and the Securities and Exchange Commission, attention Merryl Weiner, Esq., 26 Federal Plaza, New York, New York 10007, by enclosing same in postpaid, properly-addressed wrappers certified mail Nos. 240357, 240358 and 240359, respectively, with return receipts affixed thereto, and depositing said wrappers in an official depository under the exclusive care and custody of the United States Postal Service within the City of New York, New York.

Lawrence Mittman

Lawrence Mittman

Sworn to before me this
12th day of October, 1976

Notary Public

WILLIAM J. ROCHELLE, III
Notary Public, State of New York
No. 31-4814389
Qualified in [illegible] County
Commission Expires March 30, 1977